

1 **MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED BY**
2 **PLAINTIFF IN SUPPORT OF MOTION FOR A NEW TRIAL**
3

4 **1. Statement of Facts.**

5 As the Court is already aware, this action was brought by Plaintiff pursuant to *Civil Code* §
6 3344(a) against the Defendant owner and operator of an Indian gaming casino. Plaintiff alleged and
7 proved at trial that he was, without his consent, videotaped while gambling in the casino, and that this
8 videotape was used by Defendant to produce a television commercial that ran for approximately one
9 year despite the lack of Plaintiff's initial consent, as well as over his demand, in 2003, that Defendant
10 cease the use of his likeness for commercial purposes. The evidence further established that the
11 commercial continued to run, unedited, into 2004.

12 At the close of Defendant's case but before the formal charge to the jury, the Court indicated that
13 it would not permit the case to go forward as to the question of punitive damages. The Court's analysis
14 was to the effect that "evil intent" on the part of Defendant was necessary at the inception of its conduct,
15 and that unless such intent were shown to be present from the inception, no claim for punitive damages
16 could ever be sustained as a matter of law. Plaintiff objected timely to what he believed to be this
17 erroneous analysis by the Court, but the Court nevertheless, *sua sponte*, ordered that punitive damages
18 were not to be considered by the jury.

19
20 **2. Summary of Argument.**

21 Plaintiff contends that the Court's analysis concerning the punitive damage claim was and is
22 erroneous, and that the jury should have been free to consider an award of such damages. In an effort to
23 correct this error short of an appeal, Plaintiff now brings this instant motion for an order granting a new
24 trial, coupled with a proviso that at the conclusion of the second trial, the jury should be instructed, *inter*
25 *alia*, that a consideration of whether or not to award Plaintiff exemplary and punitive damages would be
26 entirely proper.
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1 **3. Civil Code § 3344(a) Expressly Provides for Exemplary and Punitive Damages.**

2 Plaintiff established a prima facie case for general damages at trial that Defendant’s advertising,
3 by using the videotape showing Plaintiff gambling at Defendant’s casino, gave rise to a cause of action
4 under *Civil Code* § 3344(a), which provides, in relevant part:

5 “Any person who knowingly uses another's name, voice, signature,
6 photograph, or likeness, in any manner, on or in products, merchandise, or
7 goods, or for purposes of advertising or selling, or soliciting purchases of,
8 products, merchandise, goods or services, without such person's prior
9 consent, or, in the case of a minor, the prior consent of his parent or legal
10 guardian, shall be liable for any damages sustained by the person or
11 persons injured as a result thereof.”

12 The sentence immediately following the language set forth above provides that at a *minimum*, at
13 least \$750 must be awarded as actual damages once a plaintiff makes a showing that he has met the
14 preceding sentence’s standards. Later, the same section goes on to explicitly provide:

15 “Punitive damages may also be awarded to the injured party or parties.”

16 [Emphasis added]

17 At no point in the statute is any mention made of any prerequisite requirement that a defendant
18 must have “evil intent” from the inception of its transgression of Section 3344(a)’s clear prohibitions. In
19 fact, out of Section 3344(a)’s total of 749 words, the term “intent” never appears. In the plain,
20 unambiguous language of the statute, an aggrieved plaintiff need only show that the defendant acted
21 “knowingly” when it improperly used the plaintiff’s likeness.

22 The fundamental rules of statutory construction include that the “...court should ascertain the
23 intent of the Legislature so as to effectuate the purpose of the law” (*Select Base Materials v. Board of*
24 *Equalization* (1959) 51 Cal.2d 640, 645); that in determining such intent, “...(t)he court turns first to the
25 words themselves for the answer” (*People v. Knowles* (1950) 35 Cal.2d 175, 182, *cert. den.* 340 U.S.
26 879); and that the court is required to give effect to statutes “...according to the usual, ordinary import of
27 the language employed in framing them.” *In re Alpine* (1928) 203 Cal. 731, 737. Courts must “...give
28 the words of the statute their usual and ordinary meaning... If there is no ambiguity in the language of

1 the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the
2 statute governs.” *People v. Loeb* (1997) 17 Cal.4th 1, 8-9. *Accord*, see *Farm Sanctuary, Inc. v.*
3 *Department of Food & Agriculture* (1998) 63 Cal.App.4th 495. The legislative intent underlying a
4 statute must be ascertained from its language; if the language is clear, there can be no room for
5 interpretation, and effect must be given to its plain meaning. *Caminetti v. Pac. Mutual L. Ins. Co.*
6 (1943) 22 Cal.2d 344, 353-354; *Skivers v. State of California* (1970) 13 Cal.App.3d 652, 655; *Moyer v.*
7 *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230. “An intent that finds no expression in the
8 words of the statute cannot be found to exist. The courts may not speculate that the legislature meant
9 something other than what it said. Nor may they rewrite a statute to make it express an intention not
10 expressed therein.” (Fns. omitted.) 45 Cal.Jur.2d, “Statutes,” § 128, p. 636.

11 *Civil Code* § 3344(a) could hardly be more clear when it says, very succinctly, that “Punitive
12 damages may also be awarded to the injured party or parties.” There is simply no basis in the statutory
13 language to even suggest that some sort of “evil intent” is required at the inception of a defendant’s
14 conduct so long as that conduct is committed “knowingly.” Lacking such a requirement, Plaintiff
15 respectfully submits that the Court erred when it precluded the jury from considering the issue of
16 punitive damages, given that the governing statute in very clear words provides for the availability of
17 exactly that remedy.

18
19 **4. Civil Code § 3344(a) Gave Plaintiff the Absolute Right to Have His Claim for Punitive**
20 **Damages Considered by the Jury.**

21 In addition to the clear statutory language of *Civil Code* § 3344(a), controlling case law also
22 afforded Plaintiff the absolute right to have his claim for punitive damages at least considered by the
23 jury, irrespective of whether the Defendant had “evil intent” at the outset of its conduct or, indeed, at
24 any time during the course of that conduct. This controlling case law makes it clear that the Legislature
25 has the right and power to promulgate statutes, such as *Civil Code* § 3344(a), that provide for potential
26 punitive damage awards regardless of whether “malice” or “evil intent” are present.

27 Prohibitions against using the likeness of an individual without consent for the promotion of
28 commercial endeavors by third parties are nothing new to the law. An early Harvard Law Review

1 article published in 1890, for example, deplored the activities of the press in reporting about society
2 functions. Warren and Brandeis, "The Right to Privacy," (1890) 4 *Harvard Law Review* 193. Since the
3 publication of that article, a multitude of cases have held that "evil intent," more commonly
4 characterized as "malice," need not be present whenever the Legislature has decided to provide by
5 statute for punitive damages irrespective of such intent.

6 The seminal case in this area that provides a whole catalog of holdings supporting the
7 proposition that malice is not a prerequisite for punitive damages whenever the Legislature so provides
8 is *Drewry v. J.D. Welch* (1965) 236 Cal.App.2d 159. There, the Court stated flatly that "We have not
9 been cited to and have found no authority holding that the Legislature does not have the power to
10 prescribe punitive liquidated damages in torts where the tort occurred without wilfulness [*sic*] or
11 malice." The Court went on to note that "There are several situations in California to which penal
12 statutes apply." The Court then proceeded to cite with approval:

13 *Kennedy v. Minarets & Western Ry. Co.* (1928) 90 Cal.App. 563, 581, where the Court, in
14 considering the application of former *Civil Code* § 3346(a) providing liability for treble (i.e., punitive)
15 damages to anyone negligently setting fire to his own woods or suffering it to extend beyond his own
16 land, said: "It is within the power of the Legislature to impose on railroad companies an absolute
17 liability for fire started by locomotives."

18 *County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 534, which cited a leading
19 South Dakota case as precedent for the proposition that "...the power extends to the imposition on such
20 companies of liability for treble damages irrespective of negligence." See *Drewry, supra*, 236
21 Cal.App.2d 159 at 173.

22 The *Drewry, supra* Court went on to point out that:

23 "Section 3015 of [the] Corporations Code provides for a penalty to be
24 payable to a requesting shareholder for failure of the corporation within 30
25 days to keep the required share register or books of account or to submit
26 required financial statements."

27 The point of this observation was that the penalty applied irrespective of even mere negligence,
28 let alone "evil intent" or malice.

1 The *Drewry, supra* Court continued its elaboration on its fundamental principle by observing
2 that:

3 “Section 52 of the Civil Code provides that for violation of the rights
4 guaranteed by section 51, the one denied such rights may recover \$250 in
5 addition to actual damages.” 236 Cal.App.2d 159 at 174.

6 *Drewry, supra* then went on to cite the holding in *Greenberg v. Western Turf Assn.* (1903) 140
7 Cal. 357, in which the plaintiff brought an action for damages and for the \$100 penalty provided by
8 then-applicable statutes for refusing him admission to the defendant’s race track. The *Greenberg* Court
9 held that “The imposition is in its nature penal,” 140 Cal. 357 at 364, and that the plaintiff could recover
10 his actual damages, exemplary damages, and in addition, the \$100 penalty. This holding was based
11 solely on a statute very akin to *Civil Code* § 3344(a), in that the statute itself established the availability
12 of punitive damages independently of any other statutory or common law rules.

13 Following its citation of the holding in *Greenberg, supra*, the *Drewry, supra* Court then went on
14 to itemize an additional nine separate California statutory provisions that, just like *Civil Code* § 3344(a)
15 in the action at bar, all authorized exemplary or punitive damages without the necessity for showing any
16 type of malice or “evil intent.” Then, in summarizing its holding, the *Drewry, supra* Court referred to
17 the Washington case of *Harold v. Toomey* (1916) 92 Wash. 297, which was an action for trespass under
18 a statute providing for the trebling of damages for cutting down or injuring trees without lawful
19 authority. As quoted by the *Drewry, supra* Court, the *Harold, supra* Court held that:

20 “The statute was enacted for a just, double purpose, to punish a voluntary
21 offender and to provide, by trebling the actual present damage, a rough
22 measure of compensation for future damages not generally ascertainable.
23 Although the statute is penal in its nature, this action is not a criminal or
24 penal action, but is merely a civil action for tortious damages, with added
25 penal damages. It is not, therefore, necessary to prove an intent on the
26 part of the tort-feasor, any more than the commission of the act and its
27 consequences.” 92 Wash. 297 at 298. [Emphasis added]
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1 It is true that the *Drewry, supra* precedent is now forty-one years old. But there can be no doubt
2 whatsoever that it is still good law. It has *never* been overruled or even commented upon negatively by
3 any subsequent Court. It has been cited as precedent by the California Courts of Appeal thirteen
4 separate times in subsequently reported cases,¹ once in a very recent California unreported case,² once in
5 a California administrative law case,³ once by the United States Court of Appeals for the Ninth Circuit
6 in a bankruptcy appeal,⁴ once by the United States Tax Court,⁵ and once by the Indiana Court of
7 Appeals.⁶ It has also been examined in two separate law review articles.⁷

8 The overwhelming deluge of authority represented by *Drewry, supra*; the cases and statutes cited
9 therein that preceded it; and its subsequent progeny cannot be ignored by this Honorable Court. The
10 *Drewry, supra* Court emphasized that it could find “...no authority holding that the Legislature does not
11 have the power to prescribe punitive liquidated damages in torts where the tort occurred without
12 wilfulness [*sic*] or malice.” [Emphasis added] *Civil Code* § 3344(a), upon which the action at bar is
13 predicated, unambiguously provides that “Punitive damages may also be awarded to the injured party or
14 parties.” [Emphasis added] No mention whatsoever of “malice” or “evil intent” is even intimated.
15 Section 3344(a) is *exactly* the kind of statute that the *Drewry* line of cases have expressly upheld.
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18 ¹ *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236; *Ostling v. Loring*
19 (1994) 27 Cal.App.4th 1731; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168; *Kelly v. Yee*
20 (1989) 213 Cal.App.3d 336; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123; *Marshall v. Brown* (1983)
21 141 Cal.App.3d 408; *Heninger v. Dunn* (1980) 101 Cal.App.3d 858; *Burch v. Argus Properties, Inc.*
22 (1979) 92 Cal.App.3d 128; *Dixon v. Grossman* (1972) 22 Cal.App.3d 941; *Circle Oaks Sales Co. v.*
23 *Smith* (1971) 16 Cal.App.3d 682; *Gould v. Madonna* (1970) 5 Cal.App.3d 404; *Sloan v. Hiatt* (1966)
24 245 Cal.App.2d 926; and *Hendren v. Yonash* (1966) 243 Cal.App.2d 672.

25 ² *Doody v. Knight* (2006) Cal.App. Unpub. LEXIS 8216.

26 ³ *Re Communication TeleSystems International* (Cal. P.U.C. 1997) 76 Cal. Pub. Util. Comm’n 2d 214.

27 ⁴ *In re Dulan* (1985) 52 B.R. 739.

28 ⁵ *Lysek v. Commissioner* (1975) T.C. Memo 1975-293.

⁶ *Wright v. Reuss* (1982) 434 N.E.2d 925.

⁷ 54 Cal. L. Rev. 1843; and *Note: Due Process in Statutory Damages*, 3 Geo. J.L. & Pub. Pol’y 601 (2005).

1 Simply put, this Honorable Court’s conclusion that “evil intent” was a prerequisite to affording the jury
2 the opportunity to consider an award of punitive damages in Plaintiff’s failure flies directly in the face of
3 the clear language of the controlling statute -- and it does so irrespective of whether the “evil intent”
4 requirement is thought to apply to the Defendant’s state of mind at the outset of its prohibited conduct
5 (as the Court indicated when expressing its view), or some later time while the conduct remained
6 ongoing.

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8 **5. Analysis of How and Why the Court Erred in Precluding Presentation of the Punitive**
9 **Damages Claim to the Jury by Plaintiff.**

10 Plaintiff respectfully submits that when it declined to allow the jury to consider the punitive
11 damages claim, the Court was inadvertently misled by an attempt to regard the provisions of *Civil Code*
12 § 3294 as controlling, when in fact the correct analysis, as set forth above, would have been to simply
13 apply the plain language of *Civil Code* § 3344(a). Section 3344(a) is, after all, very fact-specific and has
14 direct applicability to the gravamen of Plaintiff’s entire claim, which involves misappropriation of his
15 personal image and likeness without his consent for the exploitation of commercial purposes. *Civil*
16 *Code* § 3294, on the other hand, is much more general and non- fact-specific, and provides, in pertinent
17 part, as follows:

18 “(a) In an action for the breach of an obligation not arising from contract,
19 where it is proven by clear and convincing evidence that the defendant has
20 been guilty of oppression, fraud, or malice, the plaintiff, in addition to the
21 actual damages, may recover damages for the sake of example and by way
22 of punishing the defendant.”

23 This Honorable Court apparently concluded that Section 3294(a)’s reference to defendants that
24 are guilty of “...oppression, fraud, or malice...” translates into an absolute requirement that in every
25 factual scenario, these elements must be present in order to support an award of punitive damages.

26 This misguided conclusion most likely had as its genesis the holding in *Davis v. Hearst* (1911)
27 160 Cal. 143, in which the expression “evil motive,” similar to this Honorable Court’s “evil intent”
28 requirement, first originated. It is true that in *Davis, supra*, the Court did indicate that “[T]he *animus*

1 *malus* must be shown to exist in every case before an award in punitive damages may be made against a
2 defendant, since the evil motive is the controlling and essential factor which justifies such an award..."
3 160 Cal. 143 at 162-164. But it has subsequently been pointed out that *Davis, supra*, is the origin of
4 merely one out of four different sets of analyses that California Courts have adopted in this area. See
5 *G.D. Searle & Company v. Superior Court of Sacramento County* (1975) 49 Cal.App.3d 22. Moreover,
6 reliance upon *Davis, supra* as precedent in the action at bar is inappropriate for at least two other
7 separate and independent reasons:

8 First, the *Davis, supra* holding has subsequently been eclipsed by more specific holdings that
9 make its generalized statement that "...the evil motive is the controlling and essential factor which
10 justifies such an award..." inapplicable to the specialized facts of the action at bar. In *Silberg v.*
11 *California Life Insurance Company* (1974) 11 Cal.3d 452, the California Supreme Court rejected the
12 rigid, absolute *Davis* standard by holding that in order to support a punitive damage award under *Civil*
13 *Code* § 3294, it need only be shown that a defendant acted "...with the intent to vex, injure or annoy, or
14 with a conscious disregard of the plaintiff's rights." 11 Cal.3d 452 at 462. [Emphasis added] The Court
15 cited the holdings in *Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 647, *et seq.*,⁸ and *Roth v. Shell Oil Co.*
16 (1960) 185 Cal.App.2d 676, 682 in support of its conclusion. The *Silberg, supra* holding fits the factual
17 scenario of the action at bar like a proverbial glove: *Civil Code* § 3344(a) grants Plaintiff the specific
18 right *not* to have his privacy invaded by a party such as the Defendant who seeks a commercial
19 advantage through the display of Plaintiff's likeness or picture without his consent. By running a
20 televised advertisement for over a year featuring Plaintiff gambling in its casino, and continuing to do so
21 even after Plaintiff objected, Defendant obviously abrogated this right. The "...conscious disregard of
22 the plaintiff's rights" is, under the holdings in *Silberg, supra*, *Wolfsen, supra*, and *Roth, supra*, sufficient
23 to sustain a claim for punitive damages. The *Davis, supra* absolute standard which entailed the "evil
24 motive" analysis, now some ninety-five years old, is, quite simply, obsolete.

25 Second, attempting to apply the generalized *Civil Code* § 3294 standard is fine so long as the
26 facts of the action are not covered by a more specific statutory provision. But that is not the case here.

28 ⁸ Overruled on another ground in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497.

1 Irrespective of the manner in which the individual causes of action may have been couched in the
2 original complaint, it certainly was made clear by the time of trial that the gravamen of Plaintiff's
3 grievance against the Defendant casino was the latter's violation of the guaranteed *Civil Code* § 3344(a)
4 right to privacy against the display of photographs and likenesses of Plaintiff for commercial purposes
5 without his consent. As explained in detail in ¶4 hereinabove, the decision in the *Drewry, supra* case
6 cited a total of thirteen separate precedents (fourteen, when *Drewry* itself is included) in support of the
7 proposition that whenever the Legislature sees fit to enact a statute that provides for punitive damages
8 under specified circumstances, it is entirely free to do so. It did exactly that when it adopted *Civil Code*
9 § 3344(a). As also pointed out in ¶4 hereinabove, the holding in *Drewry, supra* has never been
10 overruled; never been commented upon unfavorably⁹; and has been cited as precedent by numerous
11 courts in eighteen subsequent cases. Thus the conclusion that, to support an award of punitive damages:
12 "It is not, therefore, necessary to prove an intent on the part of the tort-feasor, any more than the
13 commission of the act and its consequences." *Harold, supra*, 92 Wash. 297 at 298, as cited with
14 approval by *Drewry, supra*, 236 Cal.App.2d 159 at 174-175.

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16 **6. Standards to Be Applied by the Court to a Motion for a New Trial.**

17 *Code of Civil Procedure* § 657 provides, in relevant part:

18 "The verdict may be vacated and any other decision may be modified or
19 vacated, in whole or in part, and a new or further trial granted on all or
20 part of the issues, on the application of the party aggrieved, for any of the
21 following causes, materially affecting the substantial rights of such party:
22 ***** 7. Error in law, occurring at the trial and excepted to by the party
23 making the application."

24 Here, Plaintiff contends that this Honorable Court's decision to refrain from sending the
25 question of punitive damages to the jury was clearly an error of law, as established in ¶¶ 4 and 5
26 hereinabove, and that Plaintiff is accordingly entitled to a new trial. The specific question of under what
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 ⁹ The holding is so unambiguous that it has never even been *distinguished* by any other Court, either.

1 circumstances a motion for a new trial should be granted or denied when the error claimed involves the
2 Court's preclusion of allowing the jury to consider the punitive damages issue was addressed at some
3 length in *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468. There, the Court indicated that "In
4 reviewing the trial court's order granting Stewart a new trial on the punitive damage claim, we
5 necessarily review the correctness of the court's original order granting Truck a non-suit on that issue."¹⁰
6 17 Cal.App.4th 468 at 481. The Court further held that an order directing a non-suit on the issue of
7 punitive damages may be:

8 "…properly granted only if it appeared from the evidence, viewed in the
9 light most favorable to Stewart, that there was no substantial evidence
10 supporting a punitive damage claim. If there was some credible evidence,
11 even though in conflict with other credible evidence, that is sufficient;
12 similarly, it is enough if reasonable inferences may be drawn from the
13 evidence presented which will satisfy the requirements of a claim for
14 punitive damages. In making this evaluation of the evidence the trial court
15 may not weigh the evidence or judge the credibility of witnesses." (Citing
16 *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839; and
17 *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611.)

18 As established in ¶¶ 4 and 5 hereinabove, failing to send the issue of punitive damages to the
19 jury for consideration was plainly an error of law. Under *Stewart, supra*, Plaintiff's proper remedy, and
20 this Honorable Court's duty, is the rectification of this error by the granting of a new trial.

21
22 **7. Conclusion.**

23 Properly analyzed, this is not a *Civil Code* § 3294 case. It is a *Civil Code* § 3344(a) case. But
24 either way, in the end analysis the distinction really makes very little or no difference.

25 Even if it were a *Civil Code* § 3294 case, the idea that the Defendant was required to have an
26 "evil motive" or "evil intent" either at the inception of its conduct, or for that matter at any time

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28 ¹⁰ Though not labeling its action as such at the time, in the action at bar this Honorable Court effectively granted Defendant a non-suit on the issue of punitive damages by refusing to allow the jury to take up the question.

1 thereafter, is a relic left over from what little remains of the 1911 holding in *Davis, supra*. The more
2 contemporary holdings in *Silberg, supra*, *Wolfsen, supra*, and *Roth, supra*, have established that Plaintiff
3 need only show that Defendant's conduct was carried out "...with a conscious disregard of [his] rights."
4 *Silberg, supra*, 11 Cal.3d 452 at 462. Especially in view of the proof offered at the time of trial that
5 Defendant's television commercials depicting Plaintiff without his consent continued to run for
6 approximately one year, even after Plaintiff objected, the "conscious disregard of Plaintiff's rights"
7 standard has clearly been met.

8 Most importantly, this is without a doubt a *Civil Code* § 3344(a) case. The Legislature saw fit
9 when enacting that section to specifically include a provision allowing aggrieved parties to recover
10 punitive damages, and did *not* include any language even vaguely similar to that found in *Civil Code* §
11 3294. Plaintiff met his prima facie burden of proof at trial under *Civil Code* § 3344(a), and this
12 Honorable Court's determination that the jury should not be afforded the opportunity to determine
13 whether or not punitive damages were warranted (and if so, in what amount) was plainly erroneous.

14 For each of the reasons specified above, Plaintiff is entitled to a new trial as a matter of right,
15 and prays that the instant Motion for a New Trial be granted.

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17 Dated: November ____, 2006

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19 Respectfully submitted,

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22 _____
23 Attorney for Plaintiff
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